

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)

Petition of Bell Atlantic)
for Forbearance from)
Section 272 Requirements in Connection with)
National Directory Assistance Services)
_____)

CC Docket No. 97-172

COMMENTS OF EXCELL AGENT SERVICES, L.L.C.

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COMMENTS OF EXCELL AGENT SERVICES, L.L.C.

Excell Agent Services, L.L.C. (“Excell Agent Services” or “Excell”), by its attorneys, hereby files its reply comments in response to Bell Atlantic’s petition seeking forbearance from section 272 requirements in connection with the provision of its national directory assistance services.¹

I. INTRODUCTION AND SUMMARY

In its Petition, Bell Atlantic seeks the same relief granted to US WEST when US WEST sought forbearance from section 272 of the Communications Act of 1934, as amended (the “Act”), in connection with the provision of US WEST’s national directory assistance (“DA”)

¹ Petition of Bell Atlantic for Forbearance from Section 272 Requirements in Connection with National Directory Assistance Service, CC Docket No. 97-172 (Oct. 22, 1999) (“Petition”).

services.² In line with the US WEST NDA Order, Bell Atlantic's provision of non-local DA service, albeit an interLATA service, is permitted under section 271(g)(4), the exception for incidental interLATA services. If the FCC permits Bell Atlantic to opt into the US WEST NDA Order, the FCC will forbear from applying the separate subsidiary requirements of section 272 to Bell Atlantic but retain the nondiscrimination requirements it retained in US WEST NDA Order pursuant to section 272(c)(1).³ Under these nondiscrimination provisions, an RBOC must: (1) make available to unaffiliated entities all of the in-region directory listing information it uses to provide region wide DA service at the same rates, terms, and conditions it imputes to itself; (2) make changes to its cost allocation manual to reflect this change accordingly; (3) make the directory listing information of the customers of independent and competitive local exchange carriers ("LECs") operating in its region available to unaffiliated entities if the RBOC uses the same information in its provision of non-local DA service; and (4) update and maintain the directory listing information it provides to unaffiliated entities in the same manner it updates and maintains the directory listing information it uses in the provision of non-local DA service.⁴ Bell Atlantic concedes in its Petition that it will comply with all of these non-discrimination requirements.⁵

² See Petition of US WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance, Petition of US WEST Communications, Inc. for Forbearance; The Use of N11 Codes and Other Abbreviated Dialing Arrangements, Memorandum Opinion and Order, CC Docket Nos. 97-172 and 92-105 (rel. Sept. 27, 1999) ("US WEST NDA Order").

³ Id.

⁴ Id., para. 37.

⁵ See Petition, at 4.

In these comments, Excell urges the FCC to recognize the fact that the RBOCs can manipulate the non-discrimination requirements established in the US WEST NDA Order to charge anti-competitive rates for DA data to unaffiliated entities. The non-discrimination requirements in their current form have not curbed US WEST's practice of assessing unjust and unreasonable rates for directory assistance data to unaffiliated entities. As the FCC explained in the US WEST NDA Order, "because of [the RBOCs'] dominance in the local market, [they have] the ability to charge rates for directory listing information that may make it difficult for competing providers of non-local directory assistance service to succeed in the market and at the same time, give [the RBOCs] a competitive advantage."⁶ It was for this reason that the FCC retained certain non-discrimination requirements from section 272 in the US WEST NDA Order. However, since the requirements as currently written have not deterred the RBOCs from treating unaffiliated providers of DA in a discriminatory fashion, the FCC should determine that if the FCC finds that LECs must provide DA data at cost-based rates in the DA Access Proceeding,⁷ it should apply that safeguard to the RBOCs in this proceeding (on a retroactive basis if necessary). In addition, if the FCC develops any other pro-competitive safeguards in the DA Access Proceeding, it should similarly apply those safeguards to any RBOCs which may obtain forbearance relief.

⁶ US WEST NDA Order, para 53.

⁷ Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Provision of Directory Listing Information Under the Communications Act of 1934, As Amended, Third Report and Order; Second Order on Reconsideration of the Second Report and Order; Notice of Proposed Rulemaking, 16 CR 3019 (1999) ("DA Access Proceeding").

Additionally, the FCC should also determine, as it did in a recent order addressing a complaint by MCI Telecommunications Corporation (MCI) against US WEST and Ameritech,⁸ that Bell Atlantic was in violation of section 271 of the Act the entire time it provided the nationwide component of its DA service using facilities owned by VoltDelta. Finally, the FCC should determine that the 3 year sunset deadline set in section 271(f)(1) should have no bearing on the non-discrimination requirements set forth in the US WEST NDA Order. If the Commission does set a sunset date for the non-discrimination requirements established in the US WEST NDA Order, the Commission should set that sunset at a minimum of 7 years from the date any RBOC may be granted forbearance relief.

II. THE FCC SHOULD RECOGNIZE THE RBOCs' ABILITY TO MANIPULATE THE NON-DISCRIMINATION REQUIREMENTS ESTABLISHED IN THE US WEST NDA ORDER AND APPLY ANY PRO-COMPETITIVE SAFEGUARDS IT DEVELOPS IN THE DA ACCESS PROCEEDING TO THE RBOCs IN THE INSTANT PROCEEDING ON A RETROACTIVE BASIS

In its forbearance proceeding, US WEST sought relief from section 272 which would have required it to provide non-local DA services through a separate affiliate. The FCC determined that it would refrain from applying section 272 in its entirety, but would retain the non-discrimination requirements under section 272(c)(1) in connection with US WEST's provision of non-local DA services. Section 272(c)(1) provides that a BOC "may not discriminate between [its section 272 affiliate] and any other entity in the provision or

⁸ MCI Telecommunications Corp. v. US WEST Communications, Inc., et al, Memorandum Opinion and Order, File Nos. E-97-40 and E-97-19, DA 99-2479, para. 17 (rel. Nov. 8, 1999) ("MCI Order").

procurement of goods, services, facilities and information”⁹ To guard against such unlawful discrimination, the FCC determined that US WEST must “make available to unaffiliated entities all of the in-region directory listing information it uses to provide region wide directory assistance service at the same rates, terms and conditions it imputes to itself.”¹⁰

The FCC made this determination based upon its finding in the record that “the rates US WEST charges unaffiliated entities for obtaining directory listing information have the potential to adversely affect competition in the non-local directory assistance market.”¹¹ Excell believes that the FCC was concerned with the record before it which demonstrated the exorbitant rates the RBOCs charge for access to directory assistance data and prescribed a remedy it thought would bring those rates to a competitively reasonable level. However, instead of respecting the non-discrimination requirement imposed on US WEST in the US WEST NDA Order as an admonition against RBOC anti-competitive practices, the RBOCs have treated the non-discrimination requirements as a loophole to enable them to continue to charge unreasonable rates to unaffiliated entities. In effect, under the non-discrimination requirement, the RBOCs are able to charge any rate, no matter how unreasonable, to unaffiliated entities as long as they “impute” those same rates to themselves. Certainly, US WEST was required to “record any charges it imputes for its non-local directory services in its revenue accounts” and to “account for any imputed charges by debiting its non-regulated operating revenue accounts and crediting its

⁹ 47 U.S.C. § 272(c)(1).

¹⁰ US WEST NDA Order, para. 37.

¹¹ US WEST NDA Order, para. 35.

regulated revenue accounts by the amounts of the imputed charges.”¹² However, this is a mere procedural requirement that does not detrimentally affect an RBOC’s ability to compete. On the other hand, the unaffiliated entities that must pay these excessive rates for DA data to the RBOCs do not have the luxury of debiting their non-regulated operating revenue accounts and crediting their regulated revenue accounts. Excell submits that the RBOCs may be able to comply with the FCC’s imputation requirements in every respect, but that such requirements will defeat the FCC’s original purpose in retaining the non-discrimination provisions under section 272 in the US WEST NDA Order: to “ensure that the competitive advantages US WEST enjoys with respect to the provision of directory assistance service throughout its region will not undermine competition in the market for non-local directory assistance.”¹³

In the DA Access Proceeding, several parties suggested that the FCC impose specific regulatory safeguards on the LECs in order to promote competition in the market for directory assistance services. Independent DA providers and the carriers that purchase wholesale DA from these providers filed comments in the DA Access Proceeding demonstrating to the FCC that LECs should be required to permit non-discriminatory access to their DA data at rates based on costs. Thus, Excell submits that the FCC should condition any relief it may grant to Bell Atlantic in this proceeding on the applicability of any pro-competitive safeguards it may adopt in the DA Access Proceeding. Because the FCC may resolve the RBOC forbearance proceedings prior to resolving the DA Access Proceeding, it should determine that any pro-competitive safeguards

¹² Id. para. 37, n.95.

¹³ US WEST NDA Order, para. 36.

developed in the DA Access Proceeding will be retroactively applied to the RBOCs that may be subject to the decisions in these forbearance proceedings (including US WEST).

Indeed, the FCC is authorized pursuant to section 271(h) to apply potential pro-competitive findings in the DA Access Proceeding to the RBOCs that seek or have obtained forbearance. Section 271(h) states that the FCC must “ensure that the provision of services authorized [as incidental interLATA services under section 271(g)] by a Bell operating company or its affiliate will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market.”¹⁴ Currently, the RBOCs can manipulate the non-discrimination requirements in such a way that allows them to continue to charge excessive and unreasonable rates to their competitors for the provision of directory assistance. This adversely affects the market for DA services and is ultimately injurious to telephone exchange service ratepayers.

III. THE FCC SHOULD CLARIFY THAT THE NON-DISCRIMINATION REQUIREMENTS PROHIBIT AN RBOC FROM DISCRIMINATING BETWEEN “CLASSES” OF UNAFFILIATED ENTITIES

Bell Atlantic’s current offer to Excell would require the purchase of a minimum of 60,000,000 listings with a minimum fee of \$1,800,000 for the first year of its contract and a minimum of 30,000,000 listings for each year after the first year of the contract. Conversely, Excell has learned that Bell Atlantic does not routinely require competing providers of telephone exchange service and telephone toll service to purchase a minimum number of listings. Bell Atlantic, in its provision of DA data to unaffiliated entities under the requirements established in

¹⁴ 47 U.S.C. § 271(h).

the US WEST NDA Order, should not be permitted to discriminate in any manner between classes of unaffiliated entities. In its Petition, Bell Atlantic concedes that it will comply with the non-discrimination requirements set forth in the US WEST NDA Order. Thus, the FCC should reaffirm those broad non-discrimination requirements in this proceeding.

IV. THE FCC SHOULD FIND THAT PRIOR TO BELL ATLANTIC'S PURCHASE OF VOLTDelta's INFORMATION STORAGE FACILITIES, IT WAS PROVIDING NON-LOCAL DIRECTORY ASSISTANCE DATA IN VIOLATION OF SECTION 271

In the US WEST NDA Order, the FCC construed section 271(g)(4) to permit a BOC to offer non-local directory assistance only when it uses its own information storage facilities.¹⁵ Because Bell Atlantic states in its Petition that it was providing non-local listings outside of New York and New England using storage facilities owned by VoltDelta, the FCC should declare that Bell Atlantic, until it purchased VoltDelta's facilities, violated section 271. The FCC recently determined that "US WEST had been and will be violating section 271 of the Act by providing the nationwide component of its directory assistance services [while it does not own the information storage facility accessed by US WEST to provide these services] from the date it began offering non-local directory assistance service until the date upon which US WEST brings the nationwide component of its service into full compliance with the requirements set forth in the [US WEST NDA Order]."¹⁶ Excell believes that US WEST continues provide nationwide DA services over the facilities of other entities in violation of the FCC's directive in the US WEST NDA Order that "US WEST must cease providing nationwide directory assistance until

¹⁵ See US WEST NDA Order, para. 23; see also MCI Order, para 17.

¹⁶ MCI Order, para. 17.

that service is reconfigured to comply with section 271(g)(4).”¹⁷ The FCC should be cognizant of this. Similarly, the FCC should recognize and determine that Bell Atlantic was also in violation of section 271 for providing the nationwide component of its DA service until it purchased storage facilities from VoltDelta.

V. THE SUNSET PROVISIONS IN SECTION 272 DO NOT APPLY TO THE NON-DISCRIMINATION REQUIREMENTS ESTABLISHED BY THE FCC IN THE US WEST NDA ORDER AND IN THE ORDER THAT WILL ADDRESS BELL ATLANTIC’S PETITION OR, IN THE ALTERNATIVE, THE SUNSET PROVISIONS SHOULD BE EXTENDED TO 7 YEARS OR BEYOND

Excell is concerned that the provisions of section 272(f)(1) may be interpreted to create a sunset for the non-discrimination requirements the FCC applied to US WEST and will potentially apply to other RBOCs in their provision of non-local DA services pursuant to section 272(c)(1). Section 272(f)(1) states that the “provisions of [section 272] . . . shall cease to apply with respect to the manufacturing activities or the interLATA telecommunications services of a Bell operating company 3 years after the date such Bell operating company or any Bell operating company affiliate is authorized to provide interLATA telecommunications services under section 271(d), unless the Commission extends such 3-year period by rule or order.”¹⁸ Excell submits that the FCC has determined that non-local DA service provided by the RBOCs is an incidental interLATA service permitted under the section 271(g)(4) exception, and since the statutory sunset applies to services authorized pursuant to section 271(d) and not incidental interLATA services authorized pursuant to section 271(g)(4), section 272(f)(1) does not apply.

¹⁷ See US WEST NDA Order, para. 63.

¹⁸ 47 U.S.C. § 272(f)(1) (emphasis added).

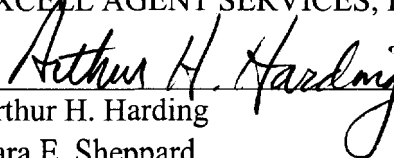
In the alternative, section 272(f)(1) enables the FCC to extend the 3 year period by rule or order, and Excell submits that if the FCC does apply the sunset in section 272(f)(1) to the non-discrimination requirements it established in the US WEST NDA Order, it should change that sunset date to at least 7 years from the date any RBOC may be granted forbearance relief.

VI. CONCLUSION

For the reasons explained herein, the FCC should grant Bell Atlantic's Petition to opt into the US WEST NDA Order. However, the FCC should also find that any pro-competitive safeguards established in the DA Access Proceeding, including any provision that would require the RBOCs to provide access to DA data at cost-based rates, must be applied to Bell Atlantic and the other RBOCs that seek or have obtained forbearance from section 272 in CC Docket No. 97-172. This finding and the other findings Excell has urged throughout these comments are necessary to prevent the RBOCs from assessing unjust and unreasonable rates for DA data and to promote competition in the market for directory assistance services.

Respectfully submitted,

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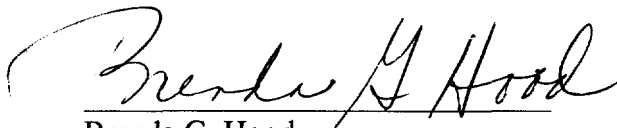
Counsel to Excell Agent Services, L.L.C.

CERTIFICATE OF SERVICE

I, G. Ann Woodbury, hereby certify that a copy of the foregoing Comments to the Petition of Bell Atlantic for Forbearance from Section 272 Requirements in Connection with National Directory Assistance Service in CC Docket No. 97-172 was served this 12th day of November, 1999, via hand delivery, upon the following:

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